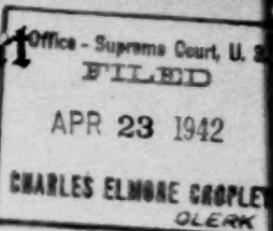


(19)

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No. 1167

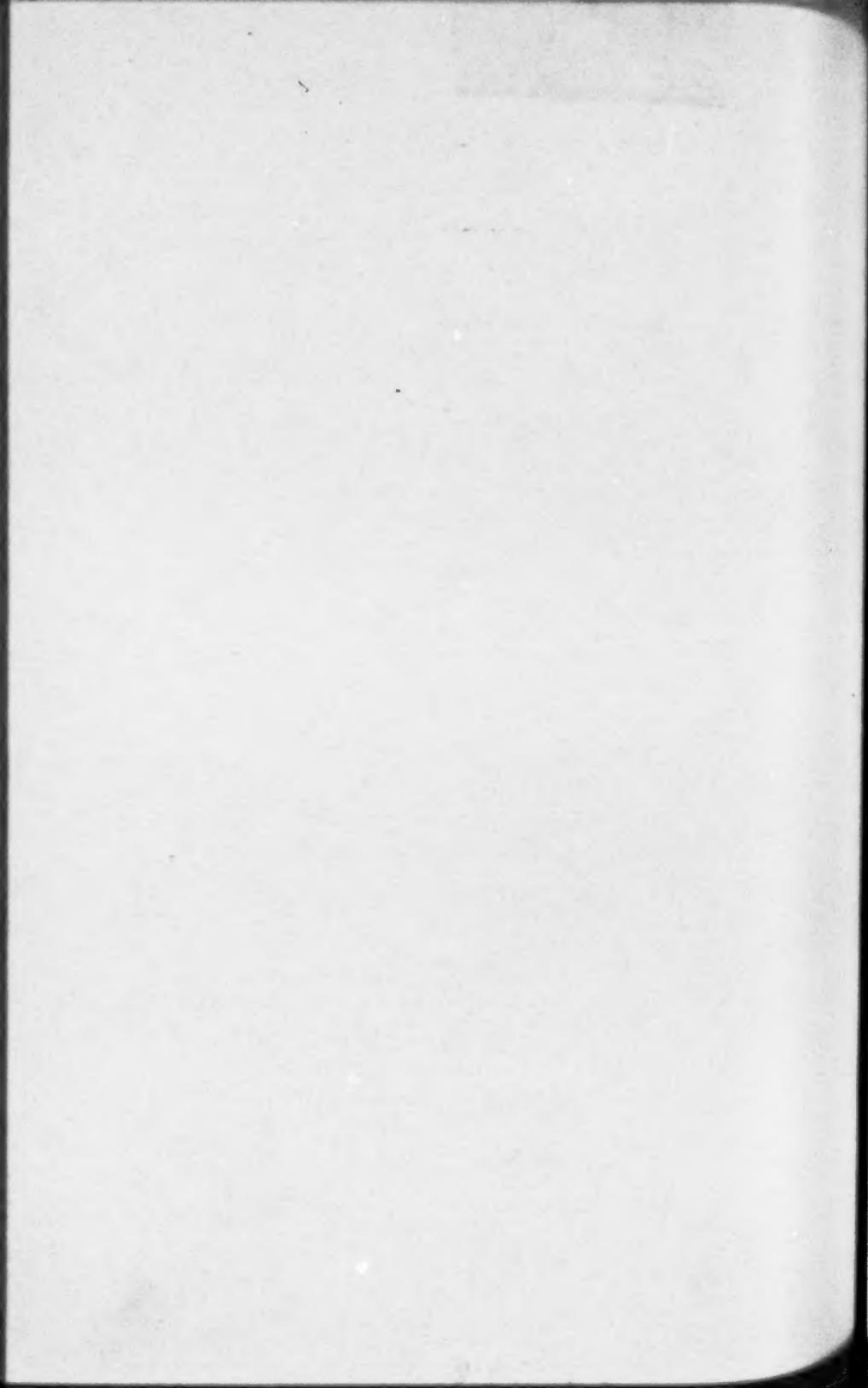


ROBERT MOODY, AUGUST J. LANG, JR., and
R. F. McMULLEN,
Petitioners,
vs.
TOOLE COUNTY IRRIGATION DISTRICT,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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No.

ROBERT MOODY, AUGUST J. LANG, JR., and
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Petitioners,

vs.

TOOLE COUNTY IRRIGATION DISTRICT,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

The petition of Robert Moody, August J. Lang, Jr.,
and R. F. McMullen respectfully shows:

JURISDICTION.

The jurisdiction of this Court is invoked under
§ 240 (a) of the Judicial Code (28 U. S. C. § 347 (a)).

The judgment of the Court below was rendered
January 28, 1942. (R. 129.) The opinion of the Court
below (R. 120-28) is reported in 125 F. (2d) 498.

The issuance of the mandate of the Court below was stayed to and including April 27, 1942, and in the event a petition for writ of certiorari be docketed in the Supreme Court of the United States on or before said date, until after the Supreme Court passes upon said petition.

QUESTIONS PRESENTED.

1. In view of the *Tompkins* case, it is now established that a state Court decision changing earlier construction of a statute is, in substance and effect, an amendment of the statute. Does it follow that a state Court decision changing the interpretation of the statute so as to impair or destroy previously established contract rights, violates the tenth section of Article I of the Constitution, forbidding the states to pass any law impairing the obligation of contracts?
2. If it does not follow, must the *Tompkins* case be taken to overrule the many cases which hold that the federal Courts are not bound to connive at repudiation of public debts by the Courts of a state? See:
Gelpcke v. Dubuque, 1 Wall. 175, 206;
Bolles v. Brimfield, 120 U. S. 759, 764.
3. Where the Supreme Court of Montana and the lower Circuit Court has declared the bonds in this case to be general obligations, do not such decisions establish a rule of property which should not be disturbed by a subsequent Montana Supreme Court decision?
4. Was it error for the Court below unqualifiedly to reverse a money judgment for plaintiffs in an

action on bonds admittedly overdue and unpaid, where there is nothing in the record to indicate that the District is without funds, and nothing to indicate that an order in the nature of a writ of mandamus, directing the levy of assessments to satisfy the debt in question, would be fruitless?

5. In a previous case, brought by a stranger to the present proceeding, it was held that the very bonds here involved were general obligations, and that all the lands within the District were assessable until all the bonds were paid. Petitioners brought this action on said bonds as trustees; and one of the *cestuis* was an intervener in the previous case. Is it *res judicata* against the District that the bonds are general obligations?

6. Where, following a Supreme Court decision of the State holding the very bonds here involved to be general obligations, the appellee enters into a new written contract to pay the amount due in full with interest and to levy taxes therefor, and there is no Montana decision holding such a contract void, does such a new promise sustain the judgment of the District Court?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. We submit that this Court should decide each of the "questions presented", set out above.

The many cases like

Gelpcke v. Dubuque, supra,

and the many more like

Bolles v. Brimfield, supra,

have not yet been overruled. The question whether or not the doctrines of those cases are still law, should, we submit, be settled.

2. The *Tompkins* case holds, we submit, that regarding substance rather than form (as should be done in constitutional cases), there is no difference in substance between an amending statute and an overruling decision which changes the construction of a statute. If this is true, then, this Court should announce whether or not such overruling decisions are embraced within, are in some manner or degree affected by, the constitutional provision that no state shall pass any law impairing the obligation of contracts.

3. We submit that the impropriety of the judgment of the Court below, flatly reversing a money judgment for money admittedly owing, is apparent.

STATEMENT OF THE CASE.

This action was brought in the District Court of the United States, District of Montana, to recover judgment for the principal and interest of certain bonds, issued by respondent pursuant to Laws of Montana, 1909, Ch. 146, as amended. (R. 120, 121.)

Respondent's answer admitted the execution of the bonds and the fact of non-payment. (R. 20.) The trial Court rendered judgment for plaintiffs (petitioners here), and defendant appealed. The judgment was reversed by the Court below.

Respondent, Toole County Irrigation District, was organized under the laws of the State of Montana in 1919. The district contains 282,191.63 acres, of

which 147,985.1 acres have been found to be irrigable.
(85 Mont. 94, 97.)

In 1921 and 1922, respondent issued the bonds in suit. At that time there had been no decision in the Appellate Courts of Montana on the principal question here in dispute. That question is whether these bonds are (as we contend), a general indebtedness, in the sense that all lands in the District are taxable for payment thereof until the entire indebtedness is fully paid, or whether (as respondent contends), each parcel of land in the District can escape from the lien of the bonds by paying merely its proportion of the total bonded indebtedness.

In 1925, the Supreme Court of Montana held that bonds of Montana irrigation districts are general obligations, as we contend they are:

Cosman v. Chestnut Valley Irrigation District,
74 Mont. 111.

Several later cases reached the same result:

Clark v. Demers, 78 Mont. 287, 293-294;
Drake v. Schoregge, 85 Mont. 94, 104.

Drake v. Schoregge, just referred to, involved the very bonds here in suit. That case was an action to enjoin a tax sale of lands in Toole County Irrigation District, under an assessment levied to create a sinking fund to pay the bonded indebtedness now before this Court. The Court held (p. 104), that

“Bonds issued create a general indebtedness against the district, in the sense that all lands therein are taxable for the payment thereof with interest, until the entire indebtedness is fully paid. (*Cosman v. Chestnut Valley Irr. Dist.*, 74 Mont. 111, 40 A.L.R. 1344, 238 Pac. 879.)”

Petitioners are trustees of the bonds here involved. (R. 81, 83, 24.) One of the *cestuis*, Mr. T. C. Elliott (R. 86), was a party to the *Schoregg* case, having filed a complaint in intervention, as did the respondent irrigation district. (85 Mont. 94, 96.)

In the present case, plaintiffs did not plead *res judicata*, for the reason that as the law then stood, petitioners were entitled to the relief sought, and were entitled to the levy of assessments against all the lands in the District until the entire amount owing was paid.

All of the bonds here in suit matured on January 1, 1930. (R. 4, 9, 13, 14.) On May 1, 1930, after default of all the bonds, respondent district entered into a contract with the bondholders called a "Plan", which is set out in full in petitioners' pleadings. (R. 65-73.) Its execution is admitted. (R. 84.) This plan recites the issuance of the bonds, the fact of default, and that

"the parties hereto desire to provide for the payment in full of the principal of said bonds, together with interest thereon until the same shall be fully and finally paid. * * *"

The District then agrees

"that it has levied, and will hereafter levy and cause to be collected, taxes upon all of the taxable land within the District in an amount sufficient to pay the entire principal amount of the bonds now outstanding, together with interest thereon, on or before the first day of January, 1935."

The District further agrees

"that it will pay interest upon the principal amount of the bonds now outstanding, at the rate

of six (6) per cent per annum, payable semi-annually on July 1st and January 1st of each year until all of said bonds shall be fully and finally paid."

Thereafter, during the depression, the Supreme Court of Montana overruled its previous decisions concerning Montana irrigation district bonds, and announced the view now relied on by respondent. The Court held that the bonds are not a general obligation of the District, but are a mere charge against the lands within it; and that the amount of delinquent assessments for the payment of the bonds and interest may not be included in later assessments against other lands in the District:

State Ex Rel Malott v. Board of County Commissioners of Cascade County, 89 Mont. 37, 85 ff.

In 1934, the Circuit Court of Appeals for the Ninth Circuit was confronted with the same problem, in

Judith Basin Irrigation District v. Malott, 73 F.(2d) 142.

In that case, the Court first stated that

"At the time the bonds involved in this action were issued and sold there was no interpretation of the statute by the Supreme Court of Montana. Under these circumstances this court must exercise its own independent judgment as to the meaning of the statute under which the bonds were issued." (73 F. (2d) 142, 145.)

After a full review of the precedents, and a detailed examination of the Montana statutes, the Court held, in accord with the earlier Montana cases, that the bonds of a Montana irrigation district (such as those

involved there and in the present case), are a general lien on the lands within the District.

The complaint in the present action was filed on April 27, 1937. (R. 2.)

Almost exactly a year later on April 25, 1938, this Court decided the case of

Erie Railroad Co. v. Tompkins, 304 U. S. 64; and the Court below, in reversing the judgment of the trial Court, held that the doctrine of its decision in

Judith Basin Irrigation District v. Malott, 73 F.(2d) 142, *supra*,

had been overruled by the *Tompkins* case, and that therefore the judgment of the trial Court must be reversed. (R. 120, 124-125.)

Wherefore, Robert Moody, August J. Lang, Jr., and R. F. McMullen pray that a writ of certiorari issue to review the judgment entered January 28, 1942, in the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause.

Dated, Turlock, California,

April 22, 1942.

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R. F. McMULLEN,
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